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Supreme Court of the United States

OCTOBER TERM, 1948

No. 390

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of A.K.M.,

Petitioner,

—against—

TOM C. CLARK, Attorney General as Successor to the Alien Property Custodian.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND PETITIONER'S BRIEF IN SUPPORT OF APPLICATION

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INDEX

PAGE

PETITION:

Summary Statement of the Matter Involved 1

Questions Presented 6

Specific Errors 8

Reasons Relied on for Allowance of Writ 8

BRIEF:

Opinions Below 13

Preliminary Statement 13

POINT I

Petitioner's title as temporary receiver or as permanent receiver of AKM under Section 977-b was not prohibited by Executive Order 8389 15

POINT II

Even if the petitioner had acquired no title, the property in question is in the exclusive custody, possession and jurisdiction of the New York court and is subject to exclusive, orderly administration and control by it, free from interference by the Custodian or any proceedings in the Federal courts 21

PAGE

POINT III

Vesting Order 2097 can operate only to seize property of AKM as of the date of issuance and cannot affect the vested rights of third parties lawfully acquired long prior thereto . . 26

POINT IV

Every consideration of public policy, law and justice requires the grant of certiorari and the reversal of the judgment below 28

CONCLUSION 30

TABLE OF CASES CITED

Becker v. Torrance, 31 N. Y. 631 18

City of New York v. Darlington, 177 N. Y. Misc. 87, 90 23

Clark v. Allen, 331 U. S. 503 24

Clark v. Willard, 292 U. S. 112, 120-121 26

Comm. for Polish Relief, Ltd. v. Banco Nationala Rumaniei, 288 N. Y. 332, affg. 262 N. Y. App. Div. 543, affg. 176 N. Y. Misc. 1070 . . . . . 9, 15, 16, 26

Converse v. Hamilton, 224 U. S. 243 26

Fred T. Ley & Co. v. Wheat, 64 F. (2d) 257 28

Guaranty Trust Co. v. Bell, 46 N. Y. S. 2d 137 . . . . . 20, 28

Harkin v. Brundage, 276 U. S. 36 28

Hirson v. United States Corporation, et al., 263 N. Y. App. Div. 646, aff'd 289 N. Y. 564 25

PAGE

Isenberg, et al. v. Trent Trust Co. Ltd., 26 F. (2d) 609, affd. 31 F. (2d) 553, Cert. Den. 279 U. S. 862 27

Leeds v. Guaranty Trust Co., 297 N. Y. 1019, affg. 272 N. Y. App. Div. 909, affg. 65 N. Y. Supp. 2d 431 ..... 9, 15, 29

Magg v. Miller, 296 Fed. 973 26
Markham v. Allen, 326 U. S. 490 ..... 9, 11, 23, 24
Metallo-Chemical Corp. v. Banque Transatlantique S.A., 188 N. Y. Misc. 596 ..... 9, 16
Meyer v. Petrograd Metal Works, 256 N. Y. App. Div. 1077; app. den. 281 N. Y. 887 ..... 17, 21, 28
Mosher v. Supreme Order, 34 N. Y. Supp. 816 18

Oakes v. Lake, 290 U. S. 59 26
Oliner v. American-Oriental Banking Corporation, 252 N. Y. App. Div. 212; affd. 277 N. Y. 588 17

Pacific Improvement Co. v. Pittsburgh S. & R. Co., 33 F. (2d) 505; cert. den. 280 U. S. 585 26
Patino v. Patino, 186 N. Y. Misc. 381 ..... 9, 15
People by Beha, Superintendent of Insurance, 256 N. Y. 177 (cert. denied 284 U. S. 687) 26
Propper v. Buck, 178 N. Y. Misc. 76; affd. 263 N. Y. App. Div. 948 19
Propper v. Taylor, 186 N. Y. Misc. 70, 72 ..... 4, 5, 19

R. & L. Goldmuntz Sprl v. Fischer, 54 N. Y. Supp. 2d 635, 640 ..... 9, 16

Singer v. Yokohama Specie Bank, 293 N. Y. 542 .. 9, 15, 29
Sutherland v. Selling, 16 F. (2d) 865, Cert. Den. 273 U. S. 760 27

PAGE

United States v. Bank of New York & Trust Co., 296 U. S. 463 ..... 21, 24
United States v. Pink, 315 U. S. 203, 210, 213 ..... 20, 28
United States v. The Antoinetta, 153 F. (2d) 138, 143 ..... 26, 27
U. S. Mortgage and Trust Co. v. M. K. T. Railway Co., 269 Fed. 497; cert. den. 256 U. S. 699 18

Walling v. Miller, 108 N. Y. 173 26
White v. Ewing, 158 U. S. 35, 40 18

OTHER AUTHORITIES CITED

1 Clark on Receivers (2d Ed.) Section 344 18

Executive Order 8389 (5 Fed. Reg. 1400) 2, 7, 9, 14, 15, 25
Executive Order 8785 (6 Fed. Reg. 2897) 2

Memo. of Governor Lehman filed with Senate Bill Int. No. 922, pr. 1623 17

Public Circular No. 31, August 2, 1946, 11 Fed. Reg. 8351 3

Section 977-b of N. Y. Civil Practice Act 2, 3, 13, 14, 15, 16, 17, 18, 19, 21, 22
Supreme Court, Rule 38 (5) (b) 10

U. S. Const. Art. VI, Par. 2 22

Supreme Court of the United States

OCTOBER TERM, 1948

No.

HENRY M. POPPER, as Receiver of the property and assets within the State of New York of A.K.M.,

Petitioner,

—against—

TOM C. CLARK, Attorney General as Successor to the Alien Property Custodian.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND PETITIONER'S BRIEF IN SUPPORT OF APPLICATION

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of the Matter Involved

A final judgment based upon a stipulation of settlement was entered in the United States District Court for the Southern District of New York and affirmed by the United States Court of Appeals for the Second Circuit, in favor of the Alien Property Custodian's Successor, as plaintiff, against Deems Taylor, as President of the American So-

ciety of Composers, Authors and Publishers (ASCAP), one of the defendants in this action. Recovery was claimed under Vesting Order 2097 of a debt due under a written contract for royalties between ASCAP and an Austrian corporation known as AKM, a licensor of performing rights of copyrighted Austrian music in a manner similar to ASCAP's business functions in this country.

For nearly five years prior to the commencement of the instant action, Petitioner had claimed the debt as Receiver of AKM pursuant to §977-b of the New York Civil Practice Act. This statute authorizes a special proceeding *in rem* with respect to assets in New York of foreign corporations whose charters have been suspended, annulled or abrogated and provides for acquisition, liquidation and distribution of such local assets for the benefit of local creditors (R. I. fols. 115-143). This aim is achieved through a statutory receiver who, by the statute, is endowed with title to such assets.

On June 12, 1941, by order of the Supreme Court of New York, Petitioner was appointed temporary receiver of AKM's New York assets, and on September 29, 1941, his appointment was made permanent by final judgment. In the interval, on June 14, 1941, Executive Order 8389 (5 Fed. Reg. 1400) was extended by the President to property in the United States belonging to Austrian nationals (Exec. Ord. 8785, 6 Fed. Reg. 2897).

The Alien Property Custodian, by Vesting Order 2097, published December 7, 1943 (8 Fed. Reg. 16463) vested the right, title and interest of AKM to certain property in the United States and purported thereunder to claim the interest of AKM in the contested chose in action against ASCAP which Petitioner, as receiver, had been litigating intensely in the New York courts since July, 1941. However, the Custodian stood by and did nothing with respect

thereto, until the institution of the instant action on April 22, 1946, when he sought to declare that Petitioner had no rights to recover royalties due from defendant ASCAP.

The District Court granted the Custodian's motion for summary judgment and dismissed Petitioner from the case (*Markham v. Taylor*, 70 F. Supp. 202). On appeal, such judgment was held not to be final and the appeal therefrom was dismissed (*Clark v. Taylor*, 163 F. 2nd 940).[1] Final judgment was then obtained upon the stipulation of settlement between plaintiff and ASCAP (R. II, fols. 10-18), over Petitioner's objections (R. II, fols. 19-33) and on appeal the Court of Appeals affirmed such judgment on August 3, 1948 (169 F. 2d 324).

It was conceded by the Custodian that Vesting Order 2097 would have been ineffectual to seize the ASCAP debt as against Petitioner's title as Receiver, except for the impact of Executive Order 8389. The Custodian contended (a) that Petitioner's appointment as Temporary Receiver did not endow him with title under §977-b; and (b) that Petitioner's appointment as Permanent Receiver would have vested him with title to AKM's assets but that Executive Order 8389 prevented this without a Treasury Department license. No such license has been issued. Moreover, Treasury Department regulations automatically require denial of licenses where the Alien Property Custodian makes claim to the property involved (Public Circular No. 31, August 2, 1946, 11 Fed. Reg. 8351).

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[1] The record on the dismissed appeal was made a part of the record on the appeal below (R. II, fols. 97-101). References herein to the record are made as follows:

Record on original dismissed appeal: (R. I).
Record on subsequent review: (R. II).

The judgment below is predicated upon the following findings:

(a) Petitioner, by his order of appointment as Temporary Receiver, acquired no such title to AKM's assets (the chose in action against ASCAP) as would defeat a *subsequent* Treasury Department freeze order (Executive Order 8389) prohibiting the transfer of enemy funds; and

(b) Petitioner's appointment as Permanent Receiver after the effective date of Executive Order 8389 did not bar the Custodian's claim.

(c) Vesting Order 2097 was therefore effective to seize the ASCAP debt unencumbered by the New York statutory receivership proceedings.

The Courts below supported such findings upon the admittedly independent federal interpretation of the nature and extent of Petitioner's rights as temporary and permanent receiver of AKM's assets under said New York statute.

While the New York Court of Appeals has not yet been called upon to define or construe the particular title of temporary and permanent receivers under its special statute, which local construction, if made, would be binding upon the federal courts, nevertheless there was a sufficient and adequate construction of Petitioner's rights and statutory title to the contested chose in action against ASCAP by the New York Supreme Court (*Propper* v. *Taylor*, 186 N. Y. Misc. 70, 72).

The New York Supreme Court held:

> "The title which C. P. A. Section 977-b confers upon the plaintiff is not a beneficial title but a title in trust for the Austrian corporation and its creditors" (p. 71).

and at page 73:

> "* * * without attempting any definite determination as to the effect of the order by which the Alien Property Custodian has sought to vest this cause of action in himself, I think it is at least safe to say that if the Custodian takes the cause of action at all, he must take it in the plight and condition in which it was when he attempted to take it; and as applied to this case that means that he takes it as one upon which a suit already had been brought in this court and in which rights by way of an attorney's lien and possibly otherwise have been acquired by the institution of the action."

The lower court decision on this point was affirmed by unanimous decision of the New York Appellate Division, First Department, the highest state court having jurisdiction to hear appeals from intermediate orders (270 App. Div. 890).

The courts below refused to dismiss or stay this Federal action pending the interpretation by the New York courts of the state legislation on the ground that it doubted that this action would affect the inner economy or sovereign rights of New York. The Court said:

> "Moreover, this case involves also unusually important federal rights, whose construction is at once more difficult and more far-reaching than any question of state's rights here involved. Such federal ruling as to wartime powers of the National Government is not of the sort which can properly await the long delays found a necessary concomitant to the seeking of state guidance in special cases" (pp. 1942-3).

The courts below also struck down Petitioner's basic jurisdictional objections that (a) the subject matter of the controversy is in the custody of the New York court and had been so for two and one-half years prior to the publication of Vesting Order 2097; (b) the rights of the Custodian are fully protected in the New York receivership proceedings, and (c) the New York statute is not repugnant to any subsequent Executive action. The Court of Appeals brushed aside the entire *ante-bellum* state receivership proceedings and the state court's custody and control of the *res*, as well as the constitutional rights of A.K.M.'s creditors, attorneys and others not parties to this action, with the following generality:

> "The federal court can resolve the claim of the Custodian and those of other claimants to property in the custody of a state court; and often, if not generally, it is important that the issue be settled promptly and decisively" (p. 1943).

Questions Presented

1. Did Petitioner's appointment as temporary statutory receiver, on June 12, 1941, endow him with title by operation of law to the debt in question which was good as against the Custodian's subsequent Vesting Order?

2. If not, did the September 29, 1941 judgment appointing Petitioner permanent statutory receiver endow him with title to the debt in question as of the date of his appointment as temporary statutory receiver which was good as against the subsequent Vesting Order?

3. If not, did the judgment appointing Petitioner permanent statutory receiver endow him with title to the debt

in question which was good as against the subsequent Vesting Order, notwithstanding that the scope of Executive Order 8389 had been extended to Austrian nationals on June 14, 1941?

4. Did the federal court properly effectuate the Custodian's attempted seizure of the debt in question and was it competent to nullify the prior seizure of the same debt by the state court in the statutory receivership proceedings, in face of the settled rule that neither a state nor a federal court may interfere with property in the custody or control of the other?

5. Did the lower courts refuse full faith and credit to the proceedings and judgment of the state court (which had adjudicated title to the debt in question to be in Petitioner as statutory receiver) in violation of the full faith and credit clause of the Constitution?

6. Did the Vesting Order, as enforced by the courts below, unlawfully deprive citizens of antecedent liens against, and rights in, the debt in question without the opportunity to be heard, in violation of the due process clause of the Constitution?

7. Was not the Custodian estopped from asserting rights paramount to, and exclusive of, Petitioner's right to the debt in question under the New York statute in circumstances where Petitioner as receiver had been carrying on intense litigation thereon against the debtor for about five years before the Custodian took any affirmative action with respect thereto and where Petitioner had already performed valuable services and incurred expenses for court costs and attorneys' fees?

Specific Errors

(1) The Court of Appeals erred in holding that Executive Order 8389 prohibited the creation of interests in property by judicial process.

(2) The Court of Appeals erred in holding that its determination did not conflict with the custody of the *res* and the control thereof as vested in the Supreme Court of the State of New York by the New York statute and the receivership proceedings thereunder.

(3) The Court of Appeals erred in failing to give full faith and credit to the New York statute and the judgment and the proceedings in the state court.

(4) The Court of Appeals erred in resolving claims as to the ownership of the entire gross receivership estate which was in the possession and custody of the New York court, instead of resolving claims to the distributive share and beneficial interest therein which may be payable to A. K. M.

(5) The Court of Appeals erred in depriving local citizens, creditors of A. K. M. (who instituted the New York receivership proceedings) and Petitioner's attorneys, of their property rights in and liens upon the chose in action without due process of law when such citizens were not made parties to the instant action.

Reasons Relied on for Allowance of Writ

This action, instituted by the Alien Property Custodian, brings into sharp focus the legal effect of Executive Order 8389 upon long pending earlier judicial process in state courts whereby transfer of property by such courts is claimed to be interdicted by federal administrative regu-

lations and interpretations of said order. The impact upon state judicial systems and state legislative action of Executive Order 8389, by subsequent administrative fiat, notwithstanding the state's exercise of its sovereign powers in a manner fully consistent with national policy, creates needless friction between federal and state rights which indubitably merits the consideration and decision of the Supreme Court of the United States.

The New York courts have interpreted the legal effect of Executive Order 8389 as not impairing the state's judicial system and have reserved to the federal domain the necessary sanction of the *payment* of enemy funds without interfering with the prosecution of private actions involving such property in the state's courts.

Leeds v. *Guaranty Trust Co.*, 297 N. Y. 1019, affg. 272 N. Y. App. Div. 909, affg. 65 N. Y. Supp. 2d 431;
Singer v. *Yokohama Specie Bank*, 293 N. Y. 542;
Comm. for Polish Relief, Ltd. v. *Banco Nationala Rumaniei*, 288 N. Y. 332, affg. 262 N. Y. App. Div. 543, affg. 176 N. Y. Misc. 1070;
Patino v. *Patino*, 186 N. Y. Misc. 381;
Metallo-Chemical Corp. v. *Banque Transatlantique S.A.*, 188 N. Y. Misc. 596;
R. & L. Goldmuntz Sprl v. *Fischer*, 54 N. Y. Supp. 2d 635, 640.

While this Honorable Court has, in *Markham* v. *Allen*, 326 U. S. 490, permitted the federal courts to decide conflicting claims to property in the possession and custody of state courts, it dealt solely with the distributive and beneficial interests of aliens to such property after payment of local claims and administration expenses and was

careful to note that such function of the federal judiciary does not and shall not interfere with, disturb, affect or usurp the normal and orderly control and administration of such property by the state courts.

In the instant action, the courts below, by the judgment sought to be reviewed, have, under the guise of resolving claims and in the interests of unwarranted speed, proceeded to wrest control of all of the property being administered by the New York court and in its custody and effectively destroyed the entire *ante-bellum* state receivership proceedings instituted for the specific statutory purpose of liquidating local assets of defunct foreign corporations for the benefit of local creditors. There is thus here involved a denial of full faith and credit to the statutes and judicial proceedings of the State of New York, in violation of the United States Constitution.

The pleadings in this action (R. I, fols. 102-112) and the evidence in the record (R. I, fols. 230-3, 247-273, 392; R. II, fols. 24-5) indicate conclusively that the local creditors of A. K. M. instituting the receivership action in the New York court, as well as Petitioner and his attorneys who have acquired statutory liens on and rights to the property in the possession of the State court, were not made parties to this action, were ignored by the courts below, and have been deprived of their property without due process of law in violation of the United States Constitution.

The grave constitutional questions here presented and the necessity of resolving the conflict between federal and state decisions as to the effect of Executive Order 8389 upon the operation of the states' legal machinery are new, novel and important federal and local questions which have not been, but should be, settled by this Honorable Court, whose power of supervision should be exercised over the courts below (Supreme Court Rule 38 (5) (b)).

This Court is respectfully solicited to review the judgment below because of (a) its wide and far-reaching effect; (b) the friction thus created between federal and state systems of our government; (c) the misconstruction of *Markham* v. *Allen*, 326 U. S. 490; (d) the invasion of constitutional rights of persons not parties to the instant action; and (e) the universal importance of the fundamental questions here presented, the prompt settlement of which by this Court will be in the public interest.

The mandate of the Court of Appeals was entered on the 3rd day of August, 1948.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court directed to the Court of Appeals for the Second Circuit commanding said Court to certify and send to this Honorable Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in the case numbered and entitled on its Docket No. 21018, Case No. 294, October Term, 1947, "Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, Plaintiff-Appellee, *versus* Henry M. Propper, as Receiver of the property and assets within the State of New York of AKM, Defendant-Appellant," to the end that this cause may be reviewed and determined by this Honorable Court as provided for by the statutes of the United States; and that the judgment herein of said Court of Appeals be reversed by this Honorable Court; and for such other and further relief as may be just and proper.

Dated, October 27, 1948.

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Supreme Court of the United States

OCTOBER TERM, 1948

No. .....

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Petitioner,

—against—

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian.

PETITIONER'S BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

Opinions Below

The opinion herein by the United States Court of Appeals for the Second Circuit is officially reported in 169 F. 2d 324. The District Court opinion is officially reported in 70 F. Supp. 202 *sub nom. Markham* v. *Taylor.*

Preliminary Statement

This action was instituted on April 22, 1946, by the Alien Property Custodian under his Vesting Order 2097, published December 7, 1943 (8 Fed. Reg. 16463, R. I. fols. 334-343), to recover a chose in action against defendant ASCAP which Petitioner as receiver, under Section 977-b of the New York Civil Practice Act (R. I. fols. 115-143),

had been litigating against ASCAP in the New York Supreme Court since his appointment as temporary receiver by that Court on June 12, 1941 (R. I. fols. 145-152). Vesting Order 2097 referred to property in the United States of AKM, an Austrian corporation.

The title to this chose in action against ASCAP was attacked by the Custodian by naming Petitioner as a co-defendant in the instant action and in seeking an adjudication that Petitioner had no rights thereto, although Petitioner had been prosecuting bitterly contested litigation in the New York Supreme Court against ASCAP thereon for almost five years prior to the commencement of this suit.

The Custodian relied upon Executive Order 8389 (5 Fed. Reg. 1400, as amended by 6 Fed. Reg. 2897) to defeat petitioner's claim of title under the New York statute and receivership proceedings, by contending that Executive Order 8389 prohibited the transfer of blocked property by judicial process and that Petitioner's litigation against ASCAP in the New York Supreme Court was therefore meaningless and should be disregarded.

In determining the title of Petitioner to the asset, the Courts below felt it necessary to overcome the express language of subd. 49 of §977-B, which provides that title to all assets within the State of New York "shall immediately vest in the receiver upon the making of the *order* appointing him" (R. I. fol. 135).

Since Petitioner's title dated from his appointment as temporary receiver on June 12, 1941, Executive Order 8389, extended to the property of Austrian nationals on June 14, 1941, would be inapplicable. Notwithstanding the express provisions of the special New York statute, the Courts below undertook independently to construe it and to hold that, as temporary receiver, Petitioner obtained merely the right to possession of the assets but that title

did not vest in him until the judgment appointing him permanent receiver on September 29, 1941. Except for the impact of Executive Order 8389, Vesting Order 2097 admittedly would have been ineffectual to seize that asset from Petitioner as statutory receiver. The effect of the intervening Executive Order 8389 upon the judicial process of the State of New York is therefore here involved.

POINT I

Petitioner's title as temporary receiver or as permanent receiver of AKM under Section 977-b was not prohibited by Executive Order 8389.

The New York Courts have considered the effect of Executive Order 8389 upon the local judicial system and have held that the purpose and effect thereof, being to control the use and disposition of alien property in the United States for purposes inimical to national welfare, did not prohibit the transfer of property by judicial process to persons not within the purview of the Trading with the Enemy Act and the executive orders thereunder.

The New York Courts have held that the prohibition extended only to the payment of alien funds and not to the transfer thereof by judicial process.

Leeds v. *Guaranty Trust Co.*, 297 N. Y. 1019, affg. 272 App. Div. 909, affg. 65 N. Y. Supp. 2d 431;
Singer v. *Yokohama Specie Bank*, 293 N. Y. 542;
Comm. for Polish Relief, Ltd. v. *Banco Nationala Romaniei*, 288 N. Y. 332, affg. 262 App. Div. 543, affg. 176 Misc. 1070;
Patino v. *Patino*, 186 Misc. 381;

Metallo-Chemical Corp. v. *Banque Transatlantique S. A.*, 188 Misc. 596;

R. & L. Goldmuntz, Sprl. v. *Fischer*, 54 N. Y. Supp. 2d 635, 640.

As pointed out by the New York Court of Appeals in *Commission for Polish Relief, Ltd.* v. *Banca Nationala Rumaniei* (*supra*), the position of the United States on this point was as follows:

> "As *amicus curiae*, the government of the United States informs us of its decision that the levies of this attachment do not offend any national policy implied by the Executive Order. We do not presume to contradict this executive determination. See *United States* v. *Pink*, 315 U. S. 203."

The purpose of §5-b of the Trading with the Enemy Act and Executive Order 8389 promulgated thereunder, was solely to enable the Executive to screen transactions involving frozen funds to determine whether they were legitimate and to suspend the consummation of any which were not. §5-b did not void transfers by judicial process and was not intended to do so. Executive Order 8389 has no expropriating effect and should not thwart the operation of the laws of New York or the orderly administration of the local courts.

Treasury Department, General Ruling 12, issued long after petitioner's appointment as permanent receiver, cannot be given retrospective force to void petitioner's previously acquired rights to the asset involved. *Miller* v. *United States*, 294 U. S. 435, 439.

§5-b was enacted in 1936 for the specific purpose of liquidating New York assets of defunct foreign corporations at the instance of local creditors (Memo. of Gov-

ernor Lehman June 8, 1936, filed with Senate Bill Int. No. 922, Pr. 1623).

Proceedings under Section 977-b are actions *in rem*.

Meyer v. *Petrograd Metal Works*, 256 N. Y. App. Div. 1077; *app. den.* 281 N. Y. 887;
Oliver v. *American-Oriental Banking Corporation*, 252 N. Y. App. Div. 212; affd. 277 N. Y. 588.

The special statute was designed to vest jurisdiction in the New York Court and title to the local *res* in the temporary receiver appointed by order of the Court, in specific situations where foreign corporations had ceased to exist.

Sub. 18 of §977-b therefore expressly provides that title to the *res*

> "shall immediately vest in the receiver upon the making of the *order* appointing him."

This is further emphasized by Subd. 12 of §977-b which provides

> "*Any receiver* appointed pursuant to this *section* shall have all the powers and duties, in addition to those herein provided for, as are possessed by and conferred upon receivers and *trustees* by the laws of the State of New York" (R. I. fol. 126).

The appointment of a temporary receiver was *mandatory* under Subd. 4 of the Statute (R. I. fol. 118).

The Courts below in their independent construction of §977-b nevertheless held that "title" referred to the permanent receiver (who is appointed by "*judgment*" under New York procedure) rather than the temporary receiver (who is appointed by "*order*" under local practice). Sup-

port for this construction was claimed under the general common law rule that temporary receivers *pendente lite* obtain only a right of possession rather than title to property. A receiver's title is derived by operation of law (*White* v. *Ewing*, 158 U. S. 35, 40).

1 Clark on Receivers (2d Ed.), §344, defines the title of temporary receivers at common law as follows:

> "All the title, if any, which remains in the individual or corporation is merely the formal legal title which is held by it in trust for the receiver, which title it could be compelled by the court at any time to convey to the receiver for the purposes of the trust. The receiver must therefore have the equitable title because the court has imposed on the property an equitable trust. And this is a qualified title because it is the subject of an interlocutory decree."

The real custodian of property in the hands of a receiver is the court appointing him, since the receiver does not represent justiciable rights of parties to litigation of which he is receiver, but is concerned only with protection of the property in his hands as such.

> *U. S. Mortgage and Trust Co.* v. *M. K. T. Railway Co.*, 269 Fed. 497; *cert. den.* 256 U. S. 689;
> *Mosher* v. *Supreme Order*, 34 N. Y. Supp. 816;
> *Becker* v. *Torrance*, 31 N. Y. 631;

Moreover, statutory receiverships which are designed to cover special situations do depart from common law rules, as in §977-b, which specifically provides that

> "any receiver * * * shall have all the powers and duties * * * as are possessed by and conferred upon

* * * *trustees* by the laws of the State of New York" (subd. 12, R. 1., fol. 126).

As was said specifically of Petitioner's title in the action instituted by him as statutory temporary receiver against ASCAP,

> "The title which C. P. A. Section 977-b confers upon the plaintiff is not a beneficial title but a title in trust for the Austrian corporation and its creditors."

Propper v. *Taylor*, 186 N. Y. Misc. 70, 71.

Even if the courts below were correct in assuming that Petitioner's statutory title was obtained upon the judgment appointing him permanent receiver on September 29, 1941, such title should be given retroactive effect under the statute and at common law to the date of the order appointing Petitioner as temporary receiver. To do otherwise would serve merely to defeat the purpose of the legislation and to nullify the acts of the temporary receiver under the statute in seeking to recover choses in action which are among the assets expressly described in Subd. 19 of §977-b. In this instance Petitioner, as temporary receiver, sued ASCAP in the New York courts on the chose in action by suit commenced July 29, 1941 after making his demand on July 9, 1941 (R. 1. fol. 286). Petitioner's authority to maintain such suit was unsuccessfully contested and his complaint against ASCAP upheld in the local courts; and Petitioner's right to maintain such suit as statutory temporary receiver was confirmed by the New York courts (*Propper* v. *Buck*, 178 N. Y. Misc. 76; affd. 263 N. Y. App. Div. 948).

Federal policy does not require nullification of local law or judicial process for the protection of the Custodian, even if receiver had no title on June 12, 1941. The Custodian would have a claim for surplus assets in the hands of Petitioner after payment of administration expenses and domestic claims allowed in the New York receivership proceedings.

United States v. Pink, 315 U. S. 203, 210, 213;
Guaranty Trust Co. v. Bell, 46 N. Y. S. 2d. 137.

In *Walling v. Miller*, 108 N. Y. 173, the New York Court of Appeals upheld a receiver's rights to property as against the rights of prior attachment creditors effected before his appointment. The Court said (p. 177):

> "The lien of the execution was not destroyed by the appointment of a receiver, but the rights and interests of all parties in the property were thereafter to be adjusted by the Court which appointed the receiver, and the property could not be taken out of the possession of the receiver and sold upon the execution without leave of the Court. The execution creditor could bring his lien to the attention of the Court in which the receiver was appointed and ask to have the execution satisfied out of the proceeds of the property."

POINT II

Even if the petitioner had acquired no title, the property in question is in the exclusive custody, possession and jurisdiction of the New York court and is subject to exclusive, orderly administration and control by it, free from interference by the Custodian or any proceedings in the Federal courts.

The fact that an officer of the United States seeks control of assets in the custody of a state court does not affect the jurisdiction of the state court and its right to administer such property.

In *Meyer v. Petrograd Metal Works*, 256 N. Y. App. Div. 1077 (*app. den.* 281 N. Y. 887), the title of the United States, as assignee, pursuant to an international treaty, to local assets of a Russian corporation, was held subordinate to that of local creditors and not to affect even a subsequent receivership action instituted under §977-b. The Court there said, at p. 1078:

> "* * * The proceeding, instituted in accordance with the provisions of Section 977-b of the Civil Practice Act, is in rem for the purpose of distribution of the assets of a foreign corporation which had been nationalized and may not be vitiated because of the status of the United States as claimant of the assets. It may, without impairment of its rights, prosecute its claim before the receiver. United States v. Bank of New York & Trust Co., 296 U. S. 463, 480."

In *United States v. Bank of New York & Trust Co.*, 296 U. S. 463, the United States, claiming title under the same International Treaty of 1933, sought by action in the Dis-

trict Court to interfere with and affect the property of a Russian corporation then under administration under §977-b in the New York Supreme Court precisely as in the case at bar. The Supreme Court of the United States unanimously denied such right on the part of the United States, notwithstanding the claim of title under the Treaty of 1933, stating at pp. 480-1:

> "In the instant case not only had the state court first acquired jurisdiction, but there are numerous persons whose claim in relation to these funds are in course of adjudication. Whether or not their claims are valid against the claim of ownership by the United States they are entitled to be heard and they are indispensable parties to any proceedings for the disposition of the property involved. * * * The adverse claimants are parties to the respective proceedings in the state court and from every point of view the principles governing the convenient and orderly administration of justice require that the jurisdiction of the state court should be respected.
>
> "* * * We cannot see that there would be impairment of any rights the United States may possess, or any sacrifice of its proper dignity as a sovereign, if *it prosecuted its claim in the appropriate forum where the funds are held.*" (Italics supplied.)

It should be noted that in the foregoing cases, the title of the United States was derived under the Treaty of 1933 which, under the Federal Constitution, is part of "the supreme law of the land." *(U. S. Const.* Art. VI, Par. 2. If title acquired pursuant to "the supreme law of the land" is subordinate to that of the rights of local creditors it necessarily follows that the rights of the Alien Property

Custodian, which are derived from a Congressional enactment, are likewise necessarily subordinate to the rights of AKM's local creditors and of Petitioner, under §977-b. This is especially true where, as here, the Trading with the Enemy Act and the Executive Orders thereunder are not confiscatory but merely authorize the Executive to seize alien property solely as a provisional measure of defense to prevent such property from coming into enemy hands during the war. Certainly, it cannot be said that property in the possession and jurisdiction of the New York Supreme Court is in any danger of falling into enemy hands (R. I. fols. 151, 177).

The governing principle, now well established, is of universal application, as shown by the number of other decisions of the Supreme Court of the United States collected in *City of New York* v. *Darlington*, 177 N. Y. Misc. 87, 90.

In *Markham* v. *Allen*, 326 U. S. 490, the Supreme Court expressly reiterated the principle previously laid down by it in *Bank of New York & Trust Co.* (*supra*), stating:

> "* * * * a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court; *Penn General Casualty Co.* v. *Pennsylvania*, 294 U. S. 189, 195, 196, and cases cited; *United States* v. *Bank of New York & Trust Co.*, *supra*, 296 U. S. 477, 478."

Markham v. *Allen* involved disputed claims to *distributive shares* of a California decedent's estate. This Court upheld jurisdiction of the federal courts to resolve such disputed claims. Clearly, however, the gross estate and the administration thereof by the California court were not there involved.

As pointed out in *Clark* v. *Allen*, 331 U. S. 503, the Custodian merely sought "a determination that they (California heirs at law) have no interest in the estate and that he was entitled to the entire *net estate after payment of administration and other expenses*" (pp. 506-7).

The instant action attempts to go much farther by claiming the *entire gross receivership assets* in the jurisdiction of the New York Court. The judgment sought to be reviewed in sanctioning such extended claim of the Custodian jettisons the general rule and violates the doctrine of *Markham* v. *Allen* (*supra*). The scope of the Custodian's contention is exemplified by the fact that he unwarrantedly seeks to deprive Petitioner, his attorneys and local creditors of their respective rights in and liens upon the receivership asset lawfully acquired by them prior to Vesting Order 2097, without making them parties to the instant action (R. I. fols. 102-112, 181-9, 230-3, 243, 248-73, 392, 402-3). In so doing, and by the judgment of the courts below, such citizens have been deprived of their property without due process of law in violation of their constitutional rights. A plainer deprivation of property rights without compensation or due process of law can hardly be imagined.

As pointed out by this Court in *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, at p. 480:

> "In the instant cases not only had the state court first acquired jurisdiction, but there are numerous persons whose claims in relation to these funds are in course of adjudication. Whether or not their claims are valid against the claim of ownership by the United States they are entitled to be heard and they are indispensable parties to any proceeding for the disposition of the property involved."

Can it be doubted, for instance, under the rule of the case just quoted, that Sobotka, who brought the action in the State Court under §977-b and obtained the order appointing Petitioner temporary receiver therein *prior* to the effective date of Executive Order 8389, and who subsequently secured the final judgment in said action, is a necessary party to this action? He certainly, under our law, is entitled to the protection of due process and due compensation before any rights secured by him in such action may be taken away from him. This is undoubtedly true at least as to his rights secured *prior* to the effective date of Executive Order 8389, even if they amounted to nothing more than the right to have the property in the custody and possession of the New York Court through its Receiver. Obviously, the complete nullification of all statutory proceedings in the State Court action from the very beginning thereof cannot be lawfully effected without his presence, as is done by the judgment below.

Moreover, in usurping the jurisdiction of the state court over the gross assets of the receivership, the courts below failed to give the New York statute and receivership proceedings the full faith and credit to which they are entitled under the Constitution.

As was pointed out in *Hirson v. United States Corporation, et al.*, 263 N. Y. App. Div. 646, affd. 289 N. Y. 564, predicated on Supreme Court decisions:

> "As the Delaware receiver's title flowed from the statutes of that State and not merely from a decree in chancery of the Delaware courts, *such title must be afforded full faith and credit as an attribute of a public act or judicial proceeding of a sister State. Relfe* v. *Rundle, supra; Converse* v. *Hamilton*, 224 U. S. 243; *Clark* v. *Willard, supra; Martyne* v. *American Union Fire Insurance Co.*, 216 N. Y. 183." (Italics supplied.)

In *Oakes* v. *Lake*, 290 U. S. 59, the same result was reached as in *Converse* v. *Hamilton*, 224 U. S. 243. Referring there to its former decision in *Converse* v. *Hamilton*, this Court pointed out that the receiver suing in the *Hamilton* case was not merely an ordinary chancery receiver, but much more; that under the laws of the state of his appointment he became a quasi assignee, vested with the rights of the creditors against the stockholders, and charged with the enforcement of those rights in the courts of the state and elsewhere; that his right to maintain an action in another state properly could not be denied as presenting a question only of comity unaffected by the full faith and credit clause of the Federal Constitution.

To the same effect, see *Clark* v. *Willard*, 292 U. S. 112, 120-121; *Pacific Improvement Co.* v. *Pittsburgh, S. & R. Co.*, 33 F. (2d) 505, *cert. den.* 280 U. S. 585.

POINT III

Vesting Order 2097 can operate only to seize property of AKM as of the date of issuance and cannot affect the vested rights of third parties lawfully acquired long prior thereto.

Vesting Order 2097 cannot operate retroactively so as to affect the vested rights of third parties. "The rights of third parties were not affected by the vesting order." *United States* v. *The Antoinetta*, 153 F. (2d) 138, 143; *Magg* v. *Miller*, 296 Fed. 973.

As was said in *People by Beha, Superintendent of Insurance*, 256 N. Y. 177 (cert. den. 284 U. S. 687), by Judge Kellogg, writing for the New York Court of Appeals, at pp. 187-8:

> * * * Surely the demand could give rise to no greater property right. Nor, indeed, could the Alien

> Property Custodian under such a demand, * * * by capture change the character of the enemy's right as obligee. * * * Such a demand neither enlarges nor contracts the rights seized.' Per Learned Hand, J., in *Kahn* v. *Garvan* (D. C.), 263 F. 909, 912. * * * in other words, the custodian by his demand takes whatever title the enemy has; he takes and acquires no greater right."

This rule is well settled and cannot be doubted.

United States v. *The Antoinetta*, 153 F. (2d) 138, 143;

Sutherland v. *Selling*, 16 F. (2d) 865, Cert. Den. 273 U. S. 760;

Isenberg, et al. v. *Trent Trust Co. Ltd.*, 26 F. (2d) 609, affd. 31 F. (2d) 553, Cert. Den. 279 U. S. 862.

The proof in this record of the right, title and interest of AKM on the date of Vesting Order 2097 in the asset here involved is the *ante bellum* final judgment in the state receivership action. Said judgment established the jurisdictional fact, required under subd. 1, §977-b, that AKM has been "dissolved and liquidated" and "ceased to do business" prior to the commencement of that action in June 1941 (R. I. fols. 147, 166-78). In other words, it stands adjudicated that since June 12, 1941, there has been no entity known as AKM capable of owning any property in New York or having any interest therein, legal or equitable, which could be the subject of seizure as enemy property. It is for this reason that subd. 16 of §977-b provides that the balance, if any, remaining after payment of creditors, should be paid (not to AKM, but) to its stockholders *pro rata* or to its foreign receiver or liquidator (R. I. fols. 132-3).

Manifestly, the paramount rights of creditors (*Meyer v. Petrograd Metal Works*, 256 App. Div. 1077, App. Den. 281 N. Y. 887 and Supreme Court cases there cited) accrued as of the date when AKM ceased to exist as an entity, as thus established by final judgment in the state receivership action. It follows, on any view of this record, that more than two years later when the Custodian's limited Vesting Order 2097 became effective, the only right which the Custodian could possibly claim thereunder would be to the balance remaining after expenses and distribution of local claims in the New York receivership proceedings under subd. 16 of §977-b (*United States v. Pink*, 315 U. S. 203, 210, 213; *Guaranty Trust Co. v. Bell*, 46 N. Y. S. (2d) 137).

POINT IV

Every consideration of public policy, law and justice requires the grant of certiorari and the reversal of the judgment below.

"A receivership when long submitted to acquires rights even when in the beginning it was without right. *Harkin* v. *Brundage*, 276 U. S. at pages 52, 58." *Fred T. Ley & Co. v. Wheat*, 64 F. (2d) 257.

"When a receiver has been thus irregularly appointed on such a bill without objection, and the administration has proceeded to such a point that it would be detrimental to all concerned to discharge the receiver, the receivership has been permitted to continue because not seasonably objected to. *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 497, 500; *In re Metropolitan Ry. Receivership*, 208 U. S. 90, 109, 111; *United States* v. *Butterworth Corporation*, 269 U. S. 504, 513." *Harkin* v. *Brundage*, 276 U. S. 36.

At the time of the commencement of this action by the Custodian on April 22, 1946, the New York receivership was nearly five years old and was about to complete its purpose. Petitioner was first appointed Temporary Receiver by order of June 12, 1941, and then Permanent Receiver by final judgment of September 29, 1941. The action by Petitioner as Temporary Receiver was commenced against ASCAP on July 29, 1941.

Before this action by the Custodian was commenced in April 22, 1946, Petitioner's action against ASCAP had been ordered by the New York Appellate Division for immediate trial in February, 1946. Had plaintiff not interfered with such trial by this action, the chose in action against ASCAP would have been reduced to cash and the rights of all parties finally determined without additional delay or expense.

Indeed, the motivation of the Custodian in instituting this action is difficult to comprehend. No genuine national interest or policy is served thereby. Surely, there has never been any danger of the New York Supreme Court ordering distribution of the receivership assets to enemy aliens in violation of the Custodian's functions. *Leeds* v. *Guaranty Trust Co., supra; Singer* v. *Yokohama Specie Bank, supra; Comm. for Polish Relief, Ltd.* v. *Banco Nationala Rumaniei, supra.* Nevertheless, the Custodian has fallen into a well contrived trap, laid by defendant ASCAP in order to settle the claim for a much smaller sum than is properly due (R. 11, fols. 27-30) by instituting this groundless action to wrest control from the New York court of the long pending litigation instituted by Petitioner therein against ASCAP and awaiting immediate trial.

The Custodian's limited Vesting Order 2097 was not filed until December 7, 1943—two and a half years after Petitioner's appointment as Receiver. No demand was

made by Custodian or his office on Petitioner at any time and nothing further was done by him under Vesting Order 2097 until the institution of this action on April 22, 1946—two and a half years after issuance of his order. During the entire lapse of almost five years, Petitioner was resisting ASCAP's dilatory proceedings in the New York courts which involved eight appeals from intermediate orders.

The only reason given by the Custodian for his failure to make any demand on Petitioner is that in his opinion no demand was necessary (R. I. fol. 302). That, of course, is for the Court to decide. But it necessarily involves a fundamental knowledge by the Custodian of the status, title and interest of Petitioner as Receiver. No such lack of knowledge is asserted or claimed and no reason whatsoever is given by the Custodian as to why nothing was done by him until he filed this action on April 22, 1946.

Such total inaction on the part of a government official vested by law with supreme, paramount and absolutely uncontrolled power and authority at least so far as his freedom of action is concerned, coupled with the obviously limited nature of his vesting order, has great legal significance. It constitutes obvious acquiescence in and recognition of the effectiveness of Petitioner's receivership and the validity of Petitioner's statutory title thereunder. The Custodian should be estopped from asserting otherwise in the instant action so tardily instituted by him.

CONCLUSION

Writ of certiorari should issue.

Respectfully submitted,

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